



**Republic v Muthengi (Criminal Case E004 of 2022)
[2025] KEHC 10195 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE E004 OF 2022**

TM MATHEKA, J

JULY 10, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSHUA MUSYOKA MUTHENGI ACCUSED

JUDGMENT

1. The accused person was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on 16/2/2022 at Malili Market Malili Location, Mukaa Subcounty Makueni County he murdered Sheilla Mutheu Mutunga.
2. Plea was taken before Hon. Dulu J. ON 10/3/2022 and he pleaded not guilty.
3. The prosecution called 6 witnesses. Accused was put on his defence and he gave sworn testimony and did not call any witnesses.
4. At the close of the trial the only issue for determination is whether the prosecution established a case beyond a reasonable doubt to sustain a conviction. To do so the prosecution must establish the ingredients of murder as set out in numerous cases including -R Vs Kariuki & another [2024] KEHC 8535(KLR). These are;
 1. The fact and cause of death.
 2. That the death was caused by the unlawful act/omission of the accused person
 3. That the act/omission was committed with malice aforethought as is defined in Section 206 of the *Penal Code*.
5. The case for the prosecution is that PW1 Mary Ndinda Muthoka was the mother of 2 children Ndanu and Sheila. Whenever she left home she would leave her children in the care of one Christine Kamayu.



It is the prosecution's case that the accused person herein used to supply her with milk and the children referred to him as "uncle wa maziwa"

6. It is the Prosecution's case that for no apparent reason at all on 15/2/2022 the accused person made a call to PW1 telling her that she would regret and mourn a lot. He then disconnected the phone. She tried to call him back in vain.
7. The Prosecution's case was that PW1 knew that the accused was a farm hand but she did not know where he worked nor who his employer was; that he was simply the milk man, and had supplied her for about a month before this incident.
8. It is the case for the prosecution that PW1 found the call distressing, and sought a day off from work to follow up on it.
9. That she went home and went to Christine Kamayu's house to check on her children. That she asked Christine where the children were. That Christine told her that her own children (Christine's) told her that her (PW1's) children had been collected by uncle wa maziwa.
10. That PW1 immediately went to report at Malili Police Post at 8.00pm. She was told to continue with the search and return the following day. It was the case for the prosecution's case that she did not know the accused's house. She took a boda boda rider who took her to the house of the accused, a mabati house in a farm. There was no one in the house
11. She returned to the police post at Malili. She was told to return the next day. She told the court that she could not sleep. She decided to look for her children. That about midnight the accused made another call telling her that he would kill her children, then kill himself, and she was to hear it on the news in the morning.
12. Upon receiving this call she testified that she ran to Christine's and they phoned Joshua together, 'to try to persuade him but he refused [and when he picked the phone] "he refused to agree with us, then he disconnected the call ..."'.
13. She went back to Malili Police Post and reported the same. The police called Joshua but he could not be reached on phone.
14. About 4.00am she met with one Musembi and one Masai. That she explained to them the situation and they took her to Joshua's house at Malili. She said it was the same house at the farm.
15. She testified that she called the name of her child Mutheu but she did not respond, however, Ndanu cried out loudly calling out to her. That it was at that point that Joshua opened the door and Ndanu rushed out between his legs. She testified that when she asked the child where Mutheu was, the child told her that Mutheu had not died. When asked where Mutheu was Joshua told them that she was with a neighbour. She testified that Joshua began taking them to the neighbour but somewhere in between, he told PW1 to go back to the house and pick her child from the bed.
16. She testified that Joshua was tricking them so that he could escape. He tried to run but Masai got hold of him. The neighbour heard the commotion, came out and they told him what had transpired. It was about 7.00am.
17. She testified that the neighbour and a Nyumba Kumi elder got hold of Joshua, and they all went to the Police Post. One of the neighbours carried Ndanu.
18. PW1 testified that at the Police Post she was told by the Nyumba Kumi people that Joshua had told them to tell her to go to his house and take away her dead child. Accompanied by the police officers



- they went to Joshua's house. She said she was not allowed to enter the house the house but she testified that the child was found lying on Joshua's bed dead. She said that the child had an injury on the side of the mouth. She testified that it was the accused who had threatened the life of her children.
19. On cross-examination by Mr. Kithuka counsel for the accused she told the court that there was no relationship between her and the accused, that she would sent him money for the milk supply she said the children would go to school at 7.30 and come home by 4pm. That she had talked to the children and they had told her they had reached the house of Celestine. That she did not know where Celestine was when Joshua took the children, that the other children told her that uncle was maziwa had not taken them forcefully. She could not recall the phone number Joshua had used to call her – she said that when Joshua made the 2nd call she was with one Celestine who heard Joshua's threat to kill the children, then kill himself. She said they did not enter Joshua's house because he told them that Mutheu was at the neighbors' place.
 20. PW2 William Musembi Mulandi testified how on 16/2/2022 at around 5.30am, he and his colleague Masai were going to work when they met PW1 Mary Ndindi whom he knew as Ndinda. She told them she was looking for her 2 children. She told them that they were with a person who brought her milk. They escorted her for about 200m to the said house. On arrival, they knocked, there was no response. She called out the names of her children – one child cried out, and soon the door was opened and a young child ran out. The woman asked the child where the other child was but this child did not answer. Then a person he identified to be the accused person came out. He was asked where the other child was and he said the child was with a neighbour. It was his testimony that they walked to the neighbour's, the neighbour came out and he too asked where the child was, that is when the accused said that the child was in the house, dead. PW2 said that at that point, "I left my phone contacts and went to work". He testified that when he and his colleague heard that the child was dead, he and his colleague left for work. He said that he did not follow up after that but later recorded his statement.
 21. On cross-examination he told the court that he knew PW1, that she worked in a bar and he was her customer. He said he did not know Joshua before, that when they reached Joshua's house he did not enter the house and denied entering Joshua's house, he said that he did not hear Ndanu say that accused told her that Mutheu was not yet dead. He said he did not know the neighbour's name. He said the neighbour came with his wife.
 22. PW3 Patrick Wambua Muteti was the Nyumba Kumi Member. He testified that on 16/2/2022 at 7.00am the employee of his neighbour called him saying he was needed over there. He named the neighbour as Paul Musembi. He told the court that he went there, found Paul Musembi, the accused, PW1 who he described as – 'a mama alikuwa anacomplain watoto', and there appeared to be a fracas between the mama and the accused person. He said that he interrogated them and the mama said accused had her 2 children and she had reported to the police – he told them there was no need for a fight and took the accused to Malili Police Post because a crowd was forming.
 23. PW3 testified that as they were taking the accused to the police station, the mama said she had seen one of the children coming from the direction of the accused's place. He testified that he told her to get child and follow up. He said the child was about 3 years old. He could not recall whether it was a boy or a girl except that they went with the child to the police station and no one asked the child any questions.
 24. At the police station he learnt that police officers had left to look for accused's homestead. He left the accused at the police station and together with the mama and others, went to look for those police offices. They found the officers – and took them to the farm of one Daniel Mwololo the alleged employer of the accused. He testified that the Police entered both the employee's house and Mwololo's house while they all stayed outside. He said the police told him and Paul to go to the Police Station.



- They did so leaving the mama there. They waited at the police station and recorded their statements. The police did not tell them what they found in Mwololo's home but he later learnt that the child was dead. He testified that the accused was working for his neighbour for almost three months but he did not know the mama. He said he did not know the accused's home.
25. On cross-examination he said he found Joshua, the mama, a man with Rasta, whose name he did not know, another man and Paul and other people at Paul's place. He said Mwololo's place was about 500m from the home of Paul. He said he asked the accused where the children were. He did not say. He said the mama kept saying she wanted her children and claimed they were with the accused.
 26. He testified that as they went to the police, a child appeared from the direction of the accused's place. The child was on the footpath. He denied that the child was found in the home of Daniel, he denied PW1's story that the child came out from inside the house. He said when they went to Daniel's house the accused had already been arrested; that by the time they took him to police the deceased child had not been found. He denied ever saying that the accused told them that the child was dead, or that the accused tried to run away.
 27. He said they went back to Mwololo's place because the mama said there was another child. Mwololo was not at home. He said he did not enter Mwololo's house, he did not see the dead child. That by the time they went to Mwololo's house the accused had already been arrested. He denied telling the police that the accused told him he had killed a child. He was not aware of any attempt by the accused to escape.
 28. No. 236097 PC Suleiman Ali was on 15/2/2022 attached at Malili Police Post when at 9.00pm he went to the report office to see PC Koech who was on duty. While there 2 women came and one complained that she had lost her 2 children and that she had been told that they had been taken by the milk man. He interrogated her and established from her that there was no relationship between her and the milkman. The report was booked and she was told to continue the search and report the following morning. She gave out the phone number for the milkman. He was rang but he did not pick. This witness later learnt that one of the children had died.
 29. On cross-examination the witness said that he was neither the Arresting nor the Investigating Officer . He said that he did not have the phone number he was given as Joshua's, number and that the complainant (PW1) did not mention the name of the milkman she was accusing of having taken her children; that he did not visit the scene, that he did not record any statement of any of the witnesses, neither was he involved in the investigations.
 30. PW5 was the Pathologist, Dr. Patrick Mugenya Kihuu. He conducted the post-mortem examination on 23/2/2022 on the body of 6 year old Sheila Mutheu – she had bruises on the face, cheeks, nose, mouth, blood was oozing from mouth. All other systems were normal including genital -urinary system. In his view the child died of lack of oxygen – asphyxia possible cause – strangulation/ suffocation. There were no marks on the neck so it could have been suffocation.
 31. On cross-examination he told the court that there was no evidence of defilement. He could not tell how the suffocation happened.
 32. PW6 No. 64316 CPL Daniel Mangi form DCI Mukaa was investigating officer in this case. He said he visited the scene and found an iron steel structure was housing the employee of the farm. He said that there were police officers at the scene. The door to the said house was broken
 33. Inside he found the body of a juvenile, lying face up a cross the bed, panty partly removed, blood oozing from mouth. He processed the scene, removed the body to the Kilungu sub county Hospital.



- He said he attended the post-mortem, and that he suspected defilement. He said vaginal swabs were taken which he prepared together with the panties and the buccal swabs from the accused person for DNA profiling.
34. It was his testimony that his investigations revealed that Joshua was selling milk to the family of PW1 and that on 15th Feb 2022 Joshua went to the home of the complainant in her absence and took her children to an unknown place and did not tell the mother. That Joshua called her about 8:00pm and told her she would cry and regret but did not tell her why and when she tried to call back he did not pick the phone.
 35. That she left her place of work, went to her house, found her house locked from the outside. She asked the neighbour whose kids went to the same school with hers to enquire and a child told her that the children had left with the milk vendor. She tried to call Joshua his phone was off.
 36. That she reported to the police who told her to go check at the accused's house. That she went there with some neighbours and the house was locked from outside. They searched in vain. That the accused called her at midnight threatening to kill the children and himself. That she pleaded with him not to harm her children, requested for a meeting but he switched off his phone.
 37. That on 16/2/2022 about 5:00am she met some sand harvesters who accompanied her and they went to the house of the accused, the door was locked from inside, and there was light but when she called out the light was put off but one of the children shouted, screamed they broke the door, that one of the girls came out screaming, the accused blocked the 2 men who had escorted PW1 – and the accused told them the other child was at a neighbour's – they began to walk with him to that neighbour's but one of the 2 men turned, entered the house of the accused, and it was then that accused began to run. The other man chased after him shouting, got hold of him, brought him back. The other one confirmed that the child was inside. That the mother screamed for help neighbours came, the suspect was arrested. That they entered the house and found the child. That she was still warm. That the mother insisted that they take the child to hospital but another another said the child was dead and they should wait for the police. They chose the latter.
 38. He formed the view that the death was caused by the accused, that he was the last one to be seen with the child. That the other child was rescued from his house, that he had threatened to kill the children. He found that the accused wanted to befriend the PW1 but she refused. He said it could not be determined what the accused had used to suffocate the child. He stated that accused told him that he and PW1 were lovers and it was not the 1st time he had taken the children – that the child had been sick and had died out of sickness.
 39. On cross-examination he said that PW1 had denied any relationship other than that accused was the milkman. He said that he was not aware of any animosity between the accused and the PW1. He said he did not retrieve the mobile phones of the 2 persons – accused/complainant/or records of their communication. He said he did not deem the phone records necessary because he only wanted to know what caused the death of the child. He said no statement was taken from Paul Musembi by him. He said the children were found in the house of accused by their mother and William Musembi and another. He was referred to the statement of PW3. He said he was not aware that accused, PW1, the 2 men and Nyumba Kumi were in the home of Paul Musembi. He denied testimony of PW3 that Ndanu was found on the path, he denied PW3's testimony that when the child was found dead, the accused was already in custody. He said the child was found with no visible injuries; that photos of the scene were taken but were not supplied.
 40. On re-examination he said he recorded statement of employer of accused.



41. The accused was put on his defence. He made sworn statement. He told the court that Paul Musembi had employed him to milk cows. On 16/2/2022 he was at his place of work –there was noise near the fence – a woman was saying she wanted her children who had been taken by a milk man. Paul called him to ask about the story – and sent from the village elder.

The village elder came and said that everyone should go to the police station – they left, him, his wife and accused – and the woman claiming children.

On the way they met a child - who the PW1 said was hers and village elder told her to carry her. He (accused) was kept at the police post, and later taken to Salama Police Station. He denied the charges against him.
42. On cross –examination he said he did not know PW1. He said he milked cows for Paul. He said he lived in a rental house in Malili. He said he was not aware of where the child was found.
43. The defence counsel filed final submissions. It is submitted that the case from the prosecution fails on three fronts–Contradiction among witnesses testimony Failure to avail crucial witness Failure to prove the charges beyond a reasonable doubt.
44. I have carefully considered the submissions and the evidence in totality and the only issue is whether the prosecution has proved the charge beyond a reasonable doubt.
45. This can only be achieved by proof of each ingredient of the offence of murder.
46. It is not in doubt the child died – and the Pathologist confirmed that it was by suffocation. However, he was unable to establish as to how the child suffocated to death. It is noteworthy that at the scene the OCS recorded that the child had no visible injuries but the post-mortem indicated bruises on the face.
47. Ultimately the prosecution established death and its cause.
48. Did the accused cause the death?
49. It is important here to look at all the evidence that prosecution relied on to charge the accused with this offence.
50. The accused denied the charge. He denied any knowledge of PW1 and testified that he did not know her or know her children.
51. The 1st connection that prosecution relied on was said to be phone calls allegedly made by the accused to the PW1 – on specific dates and times, and one of them received by PW1 in the presence and hearing of a 3rd party said to know him one Celestine.
52. The Investigating Officer stated that he did not bother to look for these communications records because his only aim in the investigation was to find out the cause of the death. It is disconcerting that the Investigating officer had framed only one question to seek an answer to in this matter.
53. Be that as it may it is inevitable that he was required to establish who had caused death. It is without doubt that the phone calls were the key to the query – since the accused denied everything.
54. Were there any phone calls between accused and PW1 at the material time? The prosecution could only have established this through the call data records of the PW1 and the accused person as alleged. They did not do so.



55. The prosecution's case was also that the accused had supplied milk to PW1 and she had evidence of sending him money for the same. The prosecution did not establish that relationship that the accused was indeed the 'uncle wa maziwa' for supplying milk to the PW1.
56. The Investigating Officer's theory was that the accused and the PW1 were lovers and that the accused was acting out because of being refused by complainant. No evidence to that effect was produced.
57. The prosecution also set out that when the children were taken the neighbour's child witnessed this. But the I.O did not visit that neighbour or take any statement from the child or the child's parents or the neighbours to establish that indeed the accused person used to supply milk to the to the PW1 to the point that he became so familiar with the children until they began to refer to him as 'uncle wa maziwa'. Neither Christine nor Celestine were called to testify with relation to the children or the phone calls that were allegedly made by the PW1 to the accused person.
58. The prosecution's case was that one child was rescued from the accused's house. It would have been expected that she would have been questioned on the issue and even to identify the alleged uncle wa maziwa. Ndanu ought to have been questioned as to where she had come from, to identify accused as to whether he was the uncle wa maziwa who had taken children.
59. While at that it was alleged accused was the employee of one David Mwololo – the owner of the land where the children were allegedly found. This person never testified to confirm that to be the position, that he was indeed the employer of the accused. The prosecution did not explain why, if indeed the accused was an employee of Daniel Mwololo why the commotion was in the homestead of Paul Musembi.
60. The evidence of Paul Musembi on where Ndanu was found is first hand evidence that directly contradicts the evidence given by the mother PW1, and the evidence of the Investigating Officer.
61. Even the manner in which the children were found is unclear. There are two scenarios provided by the witnesses. The Investigating Officer introduced a completely different fact than those given by witnesses. He alleged that one of the men who accompanied complainant entered the house of accused, that accused tried to run away. One of the men who was said to have been there when the child was found denied any entry into the house, denied any effort to stop the accused from running away. No such witness testified to that effect- and no-evidence was placed before court to support the I. O's claims.
62. Additionally, his testimony was that the children were taken from PW1's home. Yet PW1 says the children were at the home of Christine Kamuyu.
63. The identity of the alleged uncle wa maziwa is dimmed by lack of clear evidence on the part of the prosecution, the accused's person's statement of defence adds to this dimming of the identity of the person who is alleged to have killed the child.
64. What became clear after hearing the defence by the accused is that the case for the prosecution rang hollow. Without evidence to identify the accused as the uncle wa maziwa who allegedly picked the children in broad day light from the homestead of Christine, without the phone records to establish the communication that triggered the whole thing, without the evidence that accused actually lived in the alleged house where the body of child was found- and the contradiction that either the child Ndanu was found with the accused/she was found on a foot path-
65. Evidently the accused's statement of defence makes sense and throws doubt into the case for the prosecution. It is a principle that where there is doubt it has to be resolved in favour of the accused.



66. In this case there is doubt as to whether there was foul play in the death of the child and whether the accused person committed the offence.
67. I have no option but to resolve that doubt in his favour, to make a finding of not guilty and to acquit him accordingly.
68. He is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH JULY 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol Accused present

Mr. Kazungu for the state

Ms. Kyalo for the accused present

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-07-10 17:34:08

